Supreme Court, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1290

In the Supreme Court of the United States

OCTOBER TERM, 1988

DAVID R. BENJAMIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, under the Court's decision in *Midland Asphalt Corp.* v. *United States*, No. 87-1905 (Mar. 28, 1989), the court of appeals had jurisdiction over petitioners' interlocutory appeals from orders denying their motions to dismiss the indictment because of alleged violations of Fed. R. Crim. P. 6(e) and alleged prosecutorial misconduct before the grand jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	4
Midland Asphalt Corp. v. *United States*, No. 87-1905 (Mar. 28, 1989)	3, 4
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982)	5
United States v. *Benjamin*, 623 F. Supp. 1204 (D.D.C. 1985)	2
United States v. *Benjamin*, 812 F.2d 548 (9th Cir. 1987)	3
United States v. *Dederich*, 825 F.2d 1317 (9th Cir. 1987)	3
United States v. *Mechanik*, 475 U.S. 66 (1986)	3
United States v. *Nixon*, 418 U.S. 683 (1974)	5

Statutes and rules:

18 U.S.C. 371	2
18 U.S.C. 1001	2
18 U.S.C. 1503	2
18 U.S.C. 1505	2
28 U.S.C. 1254(1)	5
D.C. Code Ann.:	
§ 22-2501 (1981)	2
§ 22-2511 (Supp. 1988)	2
Fed. R. Crim. P.:	
Rule 6(e)	2, 3, 4
Rule 21(b)	2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1290

DAVID R. BENJAMIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 852 F.2d 413. The order of the panel denying rehearing (Pet. App. 21a-22a) is unreported. The opinions of the court of appeals denying the government's motions to dismiss the appeals (Pet. App. 23a-55a) are reported at 825 F.2d 1317 and 812 F.2d 548. The orders of the district court denying petitioners' motions to dismiss the indictment (Pet. App. 56a-110a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1988. A petition for rehearing was denied on December 19, 1988. Pet. App. 21a-22a. The petition for a

writ of certiorari was filed on February 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek further review of the court of appeals' decision, in two consolidated pretrial appeals, affirming orders denying motions to dismiss the indictment on account of alleged violations of Fed. R. Crim. P. 6(e) and alleged prosecutorial misconduct before the grand jury.

1. Petitioners were indicted on October 1, 1985, in the United States District Court for the District of Columbia. They were charged with conspiring to defraud the United States and to obstruct justice, in violation of 18 U.S.C. 371 (Count 1); concealing material facts before an agency of the United States, in violation of 18 U.S.C. 1001 (Count 2); obstructing proceedings before an agency of the United States, in violation of 18 U.S.C. 1505 (Count 3); obstructing justice, in violation of 18 U.S.C. 1503 (Counts 4-7); and perjury, in violation of D.C. Code Ann. §§ 22-2501 (1981) and 22-2511 (Supp. 1988) (Counts 8-22). Pursuant to Fed. R. Crim. P. 21(b), the case was transferred at petitioners' request to the Eastern District of California. See *United States* v. *Benjamin*, 623 F. Supp. 1204 (D.D.C. 1985).

Petitioners filed motions to dismiss the indictment on the basis of (i) alleged violations of Fed. R. Crim. P. 6(e) and (ii) alleged prosecutorial misconduct in connection with the grand jury investigation. The district court denied those motions. Pet. App. 95a-110a (Rule 6(e)); Pet. App. 56a-94a (prosecutorial misconduct).

2. Petitioners filed notices of appeals from the orders denying their motions to dismiss, accompanied by :ondi-

tional petitions for writs of mandamus.[1] A motions panel of the court of appeals held that the district court's orders denying petitioners' motions to dismiss were appealable collateral orders. *United States* v. *Benjamin*, 812 F.2d 584 (9th Cir. 1987) (Pet. App. 38a-55a) (Rule 6(e) order); *United States* v. *Dederich*, 825 F.2d 1317 (9th Cir. 1987) (Pet. App. 24a-37a) (prosecutorial misconduct order).[2] In each instance, the panel concluded that *United States* v. *Mechanik*, 475 U.S. 66 (1986), would preclude review of the merits of petitioners' claims after a judgment of conviction, and the panel therefore deemed those claims "effectively unreviewable on appeal from a final judgment" for purpose of the collateral order doctrine. Pet. App. 28a-30a, 45a-49a.

The appeals were consolidated for purposes of the merits. The merits panel affirmed the district court's orders denying the motions to dismiss the indictment (Pet. App. 1a-20a).[3]

ARGUMENT

In *Midland Asphalt Corp.* v. *United States*, No. 87-1905 (Mar. 28, 1989), this Court held that an order denying a

---

[1] Petitioner Schiff was not a party to the appeal from the denial of the motion to dismiss on grounds of prosecutorial misconduct. See Pet. 8 n.4.

[2] In addition, in *Dederich* the motions panel held that an order denying a motion to dismiss by petitioners Dederich and Missakian based on transactional immunity granted by a state court was not immediately appealable. Pet. App. 30a-32a. The panel also denied these petitioners' conditional petitions for writs of mandamus with respect to that order. The correctness of those rulings is not raised in the petition for a writ of certiorari.

[3] The court of appeals has granted a stay of petitioners' trial pending the disposition of their petition for a writ of certiorari.

motion to dismiss an indictment for an alleged violation of Fed. R. Crim. P. 6(e) is not immediately appealable under the collateral order doctrine. Slip op. 5-6. The Court thereby resolved a conflict on that question between the Second Circuit's decision in *Midland Asphalt* and the Ninth Circuit's decision in *United States* v. *Benjamin*, which was the case permitting petitioners to appeal immediately from the denial of their Rule 6(e) motion.

The Court in *Midland Asphalt* found that, whether or not *Mechanik* would apply to appeals from judgments of conviction that raised alleged violations of Rule 6(e), pretrial orders denying motions to dismiss based on asserted violations of the Rule could not satisfy all three elements of the collateral order doctrine. If *Mechanik* would not apply, the Court explained, those orders would not be " 'effectively unreviewable on appeal from a final judgment.' " Slip op. 6 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). On the other hand, if *Mechanik* would be controlling in appeals from judgments of conviction (as the Ninth Circuit found in this case), orders denying motions to dismiss on the basis of Rule 6(e) could not be said to " 'resolve an important issue completely separate from the merits of the action.' " *Ibid.*

Midland Asphalt requires dismissal of both appeals that are the subject of the petition in this case. The holding in *Midland Asphalt* is directly applicable to petitioners' appeal from the denial of their motions to dismiss based upon Rule 6(e) (No. 86-1337). The rationale of *Midland Asphalt* also controls petitioners' appeal from the denial of their motion to dismiss based on prosecutorial misconduct before the grand jury (No. 86-1388). The Ninth Circuit's decision upholding its jurisdiction over that appeal was based on the proposition, which *Midland Asphalt* rejected, that a claim of error that would be considered

harmless under *Mechanik*'s analysis is necessarily reviewable under the collateral order doctrine.

This Court's certiorari jurisdiction extends only to cases that are properly "in the courts of appeals." 28 U.S.C. 1254(1). Since the court of appeals lacked jurisdiction over these consolidated appeals, this Court would also lack jurisdiction to review its decision on the merits. See *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982). Accordingly, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in accordance with *Midland Asphalt*.[4]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in accordance with *Midland Asphalt Corp.* v. *United States, supra.*

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
ANDREW LEVCHUK
Attorney

APRIL 1989

[4] As was noted above, petitioners' notices of appeal were accompanied by conditional petitions for mandamus. Although we believe that review by way of mandamus is unavailable in this case, that question should be addressed in the first instance in the court of appeals.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00188